United Nations

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 936

Case No. 1039: SALAMA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza, Vice-President; Mr. Kevin Haugh;

Whereas, on 4 September 1998, Amin H. Salama, a staff member of the United Nations filed an application containing the following pleas:

"II. *PLEAS*

(i) Confirmation of Applicant's functional title as Deputy Medical Director at the D-1 level on the basis of his application for the post on 25 October 1995, which was recommended by the Appointment and Promotion Board, approved by the Secretary-General and confirmed in information circular ST/IC/1996/14.

(ii) Confirmation of Applicant's valid appointment reflected in an official notification of his selection for the post of Deputy [Medical] Director and approval by the Secretary-General, as shown in a communication from the [Assistant Secretary-General, Office of Human Resources Management (OHRM)] dated 23 January, 1996.

(iii) Confirmation of Applicant's valid appointment based on a formal offer of Deputy Medical Director in Letter of Appointment dated 31 October 1996 accepted by Applicant on 7 November 1996.

(iv) Confirmation of Applicant's valid appointment as reflected in 'Personnel Action' processing his appointment as Deputy Medical Director on [13 November 1996].

(v) Confirmation of Applicant's valid appointment as further reflected in Certificate by the Executive Officer on 6 December 1996 designating his functional title as Deputy Medical Director.

(vi) A declaration that the subsequent efforts by ... the ... Medical Director to undermine the Applicant's legitimate appointment by pressuring ... the [Assistant Secretary-General, OHRM] to designate [another staff member of the Medical Services Division] as Deputy Medical Director and her proposal to designate even **two** more [staff] members of the Medical Services Division as Deputy Medical Directors, making a total of **four**, demonstrated a high degree of bad faith and were totally arbitrary, vindictive and in clear violation of the relevant provisions of the Charter, the Staff Regulations, Staff Rules and the normal conditions of service in the United Nations Secretariat.

(vii) A declaration that the loaning of the D-1 post to ECLAC [Economic Commission for Latin America and the Caribbean] subsequent to the application by Applicant for the post and on the eve of his transfer to Headquarters was totally unwarranted and involved an implicit violation of the commitment made to the Applicant following his application for the post.

(viii) A declaration that the treatment of the Applicant by [the Medical Director] in denying him the proper office and in instructing the General Service staff not to recognize his status and functions as Deputy Medical Director and to type his official correspondence as emanating from a Senior Medical Officer were totally arbitrary, vindictive and were likely to cause the Applicant considerable humiliation and frustration. The Applicant was only allowed to use his functional title of Deputy Medical Director following the submission of his appeal to the Joint Appeals Board and a personal complaint to ... the ... [Assistant Secretary-General, OHRM].

(ix) A declaration that the recent advertisement of the post of D-1 for placement following its return from ECLAC was entirely wrong, as the post unequivocally and unconditionally belonged to the Applicant and should have been awarded to him without any hesitation.

(x) A declaration that the intrigues and manipulations demonstrated by [the Medical Director], following the Applicant's appointment were most unfortunate and

totally unbecoming any international civil servant, let alone the holder of the title and functions of Medical Director.

(xi) To order that the Secretary-General confirm the appointment and functional title of the Applicant as Deputy Medical Director at the D-1 level and to order that this have retroactive effect from the date of his placement including payment of emoluments at that level.

(xii) In the event the Secretary-General does not abide by the Tribunal's order, to award the Applicant compensation that would take into account the grave violations of his conditions of service, his improper treatment, the denial of proper emoluments and the humiliation he was subjected to by the Medical Director and by the Administration in general."

Whereas the Respondent filed his answer on 5 April 1999;

Whereas the Applicant filed written observations on 20 April 1999;

Whereas the Applicant submitted further documents on 3 May and 11 June 1999;

Whereas, on 7 July 1999, the Tribunal put questions to the Respondent, to which he provided answers on 9 July 1999;

Whereas, on 15 July 1999, the Tribunal put further questions to the Respondent, to which he provided answers on 20 July 1999;

Whereas, on 21 July 1999, the Applicant submitted comments on the Respondent' s submission of 20 July 1999;

Whereas, on 3 August 1999, the Tribunal informed the parties that it had decided to adjourn consideration of the case until its next session;

Whereas, on 18 October 1999, the Applicant submitted further comments on the Respondent's submission of 20 July 1999;

Whereas, on 26 October 1999, the Respondent submitted his comments on the Applicant's submission of 18 October 1999;

Whereas, on 27 October 1999, the Tribunal heard the parties at a public hearing at which time the Respondent submitted an additional document;

Whereas, on 28 October 1999, the Applicant submitted comments on the Respondent's submission of 27 October 1999;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 7 September 1992, on a two-year fixed-term contract as Chief Medical Officer, at the P-5, step VI level, in the Economic Commission for Africa (ECA), Addis Ababa. His appointment was extended several times until 7 July 1996. On that date he was transferred to the Medical and Employee Assistance Division (MEAD), later known as Medical Services Division (MSD), United Nations Headquarters, New York, with the functional title of Deputy Medical Director.

On 9 October 1995, an internal vacancy announcement was issued for the D-1 post of Deputy Director, MEAD (Deputy Medical Director), at United Nations Headquarters, New York. On 25 October 1995, the Applicant submitted an application for that post.

On 22 December 1995, the Assistant Secretary-General, OHRM, informed the Chairperson, Appointments and Promotion Board (APB), that the Secretary-General had decided that the Applicant was "the candidate most suitable to serve on the ... post at his current level. ... [and that] the vacancy announcement was cancelled."

On 18 January 1996, the APB, at its 1811th meeting, took note of the information from the Assistant Secretary-General, OHRM, and commented that the Applicant was "being placed against the D-1 post while retaining his present P-5 grade level." On 23 January 1996, the Assistant Secretary-General, OHRM, wrote a letter to the Applicant which stated as follows:

> "I am pleased to inform you that the Secretary-General has approved your selection for the post of Deputy Director, Medical and Employee Assistance Division. ..."

On 29 February 1996, the Assistant Secretary-General, OHRM, issued information

circular ST/IC/1996/14 "to inform staff members of recommendations made by the appointment and promotion bodies that have been approved by the Secretary-General in respect of placements and promotions." The Applicant's name appeared in the circular indicating, *inter alia*, that the Secretary-General had approved the Applicant's placement at the P-5 level against a D-1 post.

On 29 March 1996, the Medical Director wrote to the Assistant Secretary-General, OHRM, recommending that another staff member of the MSD, at the P-5 level, "be designated Acting Deputy Director of the Medical Services Division, effective 1 April 1996."

On 10 April 1996, the Applicant wrote to the Officer-in-Charge, Human Resources and Systems Management Division, ECA, stating that the Assistant Secretary-General, OHRM, and the Medical Director had agreed that he assume duties effective 1 June 1996. He further stated: "... Currently I am in the process of clearing my properties and will be ready to move to the new assignment as indicated. To this effect, I would be very grateful for the necessary assistance and guidance ... to expedite the clearing process without much interruption to my current duties at the clinic."

On 10 May 1996, the Applicant wrote to the Assistant Secretary-General, OHRM, and stated :

> "I repeat my thanks for your letter of 23 January 1996, in which you advised me [that] ... the Secretary-General has ... approved my selection for the post of Deputy Director, Medical and Employee Assistance Division.
>
> Further, reference to our telephone conversation and agreement with [the Medical Director] and your good self in which you agreed that I report to duty at Headquarters in June 1996. ...
>
> ..."

On 15 May 1996, a Human Resources Officer at the Operational Services Division, OHRM, sent a memorandum to the Officer-in-Charge, Personnel Section, ECA, requesting

release of the Applicant for transfer on 1 June 1996. On 17 May 1996, the Officer-in-Charge notified OHRM that the release had been agreed to by ECA.

On 1 June 1996, the Assistant Secretary-General, OHRM, replied to the Applicant's letter of 10 May 1996, as follows:

> "...
>
> I apologize if my letter of 23 January 1996 and the notification of your transfer approval have given rise to a misunderstanding by way of the reference to a D-1 post, Deputy Director of the Medical Services Division. In fact, I am obliged by budgetary constraints to loan the D-1 post in question for use elsewhere. For the time being, therefore, there can be no formal D-1, Deputy Director in the Medical Services Division. This is consistent with your lateral transfer to New York at the P-5 level.
>
> ..."

On 1 November 1996, the Assistant Secretary-General, OHRM, wrote to the Acting Deputy Director, MSD, informing him that "in consultation with [the Medical Director] I have decided to designate you as one of the two Deputy Medical Directors within the Medical Services Division. The other Deputy Medical Director is [the Applicant]. ..."

On 7 November 1996, the Applicant signed his letter of appointment, effective 7 September 1996, designating him as "Deputy Medical Director" at the P-5, step IX level, for a three-year fixed term appointment.

On 21 November 1996, the Medical Director wrote to the Assistant Secretary-General, OHRM, expressing her "surprise about [his] decision to designate two Deputy Medical Directors ... without discussing the matter with [her]." She noted that the D-1 post of Deputy Medical Director had been temporarily loaned to ECLAC and that "as soon as the D-1 post [was] made available to the Medical Services Division, it [would] be filled through proper vacancy management procedures." Furthermore, she requested that, in the light of the designation of two Deputy Medical Directors, two other staff members in her office also be

given the title of Deputy Medical Director so that "all Medical Officers get treated fairly ..."

On 2 December 1996, the Assistant Secretary-General, OHRM, wrote a memorandum to the Medical Director, as follows:

> "In response to your memorandum of 21 November ... please be advised that:
>
> (a) It was the decision of Secretary-General to designate [the Applicant] as Deputy Medical Director. ...
>
> (b) It was out of my high regard for [the other Deputy Medical Director], and your own respect for his seniority and competence, that I proposed to the 38th floor that he be similarly designated. This was agreed.
>
> (c) There shall be no additional deputies designated.
>
> As and when it is viable to return the loaned D-1 post to the Medical Services, an open competitive process for the appointment would be appropriate."

On 24 June 1997, the Applicant wrote to the Secretary-General requesting "that this matter be properly reviewed and that a firm decision be taken to confirm [his] functional title and level ..."

On 21 August 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 24 March 1997, the Applicant requested the JAB, under staff rule 111.2 (c) (i), to recommend suspension of action on the circulation of the vacancy announcement until the merits of his claim to the D-1 post were determined.

The JAB adopted its report on the request for suspension of action on 4 May 1998. Its considerations and recommendation read, as follows:

> *"Considerations*
>
> 9. The Panel agreed that should another person be chosen as Deputy Medical Director at the D-1 level following the re-circulation of a vacancy announcement,

Appellant would suffer irreparable harm; should he be chosen, Appellant would be granted nothing more than that to which he believes himself entitled. Circulation would therefore put in question the validity of his sole claim, as well as putting in jeopardy the promotion to which he lays claim in his appeal.

Recommendation

10. The Panel unanimously recommends that the D-1 post of Deputy Medical Director not be the subject of a new vacancy announcement until the subject appeal has been considered and decided upon."

On 29 May 1998, the Under-Secretary-General for Management transmitted to the Applicant a copy of the JAB report and informed him, in part, as follows:

"...

The Secretary-General has examined your request in the light of the Board's report. He has taken note of the Panels's findings that the requirements for suspension of action were met in your case and its recommendation that the D-1 post of Deputy Medical Director not be the subject of a new vacancy announcement until the merits of your appeal has been considered and decided upon. The Secretary-General does not agree that irreparable harm will occur if the first stages of the vacancy announcement process are set in motion pending a consideration of your appeal on the merits. Therefore, the Secretary-General has decided not to grant your request for suspension of action.

..."

The JAB adopted its report on the merits on 22 June 1998. Its considerations and recommendations read, as follows:

"***Considerations***

...

20. ... On the basis of the documents put at its disposal by [the Chairperson, APB], the Panel was able to confirm that para. 5 of Respondent's reply (...) was

factually correct. The decision made was clearly, at least to those immediately involved, to place Appellant on the D-1 Deputy [Medical] Director post at his current P-5 level. As that decision was not a decision to promote, argues Respondent, there is no basis for an appeal. The Panel was not persuaded by that argument.

21. In forwarding copies of the relevant APB documents to the Panel, [the Chairperson, APB] stated he had done so '*on the understanding that confidentiality be maintained and that these documents may not be communicated to the applicant(sic), his counsel, or any one else.*' (emphasis in the original). The Panel could safely assume that Appellant had no knowledge of these documents.

22. The Panel preceded to reconstruct the series of events from the perspective of Appellant on the basis of the facts it had before it:

> - A vacancy announcement is circulated for the post of Deputy Medical Director at the D-1 level.
>
> - The Assistant Secretary-General for Human Resources Management sends him the letter [of 23 January 1996 informing him of his selection for the post].
>
> - In reply to Appellant's memorandum, the same Assistant Secretary-General informs him that 'for the time being' there is no D-1 available for the (now) Medical Services Division (MSD), and that 'this is consistent with your lateral transfer to New York at the P-5 level.'
>
> - On Appellant's arrival in New York, a Personnel Action is issued with his functional title as Deputy [Medical] Director.

23. The Panel noted that the information was provided to Appellant not by a Journeyman Human Resources Officer, but by the official designated by the Secretary-General as his representative in all personnel matters. On the basis of the information the Panel received, Appellant had every right to conclude that he had been chosen for the D-1 post and that 'for the time being' he need only wait until the post reverted to MSD. On that basis, he accepted his transfer to [Headquarters]. The Panel felt there was a parallel in this acceptance by an individual of an offer of appointment; even if no further validating document is issued, a contractual obligation exists.

Recommendations

24. The Panel recommends that no vacancy announcement be issued for the post of Deputy [Medical] Director, MSD, or if it has been issued that it be cancelled, and that Appellant be confirmed as Deputy Director at the D-1 level.

25. If the Secretary-General decides not to accept its recommendation, above, or if the selection process has already been completed before a decision is made on this appeal, the Panel recommends that Appellant be awarded a symbolic compensation equal to the amount of an SPA [special post allowance] from P-5 to D-1 from the date of his arrival at [Headquarters] until the filling of the Deputy Director post at the D-1 level.

..."

On 3 August 1998, the Under-Secretary-General for Management transmitted to the Applicant a copy of the JAB report and informed him, *inter alia,* as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has taken note of the Panel's determination that your appeal is against the decision to circulate a vacancy announcement for the post of Deputy Medical Director and that your appeal is receivable. He has also taken note of the Panel's conclusion that a contractual obligation exists which precludes the issuance of the vacancy announcement in issue and gives you a right to be confirmed as a D-1 on this post. The Panel bases its conclusion on a letter to you, dated 23 January 1996, in which ... [the] ... Assistant Secretary-General, [OHRM], informed you that the Secretary-General had approved your selection for the post of Deputy Director, Medical and Employee Assistance Division.

The Secretary-General is not in agreement with the position taken by the Panel. The Secretary-General has found that [the Assistant Secretary-General, OHRM's] letter of 23 January 1996 stating that the Secretary-General had approved your selection for Deputy Director was incomplete. The Secretary-General had decided that you be selected for the post but that you be placed against it at the P-5 level and this should have been stated clearly in [the Assistant Secretary-General, OHRM's] letter. As indicated in the record, [the Assistant Secretary-General. OHRM] wrote to the Chairperson of the Appointment and Promotion Board (APB) on 22 December 1995 stating that the ... Secretary-General had decided that you were the candidate most suitable to serve on the post (D-1, Deputy Director) at your 'current level' (P-5) and stating also that, following the Secretary-General's decision, the vacancy announcement for the post was cancelled. The record reflects that the

APB, following its normal procedure in such cases, took note of the Secretary-General's decision and implemented it, specifying in the Information Circular on Placement and Promotion, dated 29 February 1996, your 'placement' on the D-1 post at the P-5 level.

Clearly the Secretary-General did not recommend that you be promoted to the D-1 level, no promotion exercise took place, and you were not promoted to the D-1 level. In order to be promoted, you will have to go through the competitive exercise for the post which is now in progress.

Accordingly, the Secretary-General has decided not to accept the recommendation of the Panel that the vacancy announcement process be cancelled or the recommendation that you be confirmed on this post as Deputy Director at the D-1 level. However, the Secretary-General acknowledges and regrets that [the Assistant Secretary-General, OHRM's] letter of 23 January 1996, although later clarified, did not convey the entirety of the decision which had been made by the Secretary-General. He is in agreement with the recommendation of the Panel that, as an alternative remedy for what occurred in your case, you should be awarded compensation. The Secretary-General has decided to award you compensation, not in the form of an SPA, but by an equivalent lump sum of $15,000.

..."

On 13 August 1998, the Assistant Secretary-General, OHRM, advised the Applicant as follows:

"1. ... [B]ased on the decision of the Under-Secretary-General for Management as transmitted to you in his letter to you dated 3 August 1998, it is necessary for you to apply for the post of Deputy Medical Director at the D-1 level in order to be considered for promotion.

2. ... In order to be promoted, you will have to go through the competitive exercise for the post which is now in progress.

3. Therefore, I assume that you will submit an application for the vacancy ... the Departmental Panel has not yet considered this case and I will ensure that you receive every consideration."

On 25 August 1998, the Applicant applied for the post of Deputy Medical Director.

On 4 September 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The Applicant had a valid appointment to the D-1 post of Deputy Medical Director, which was approved by the Secretary-General. The loaning of the D-1 post to ECLAC and the issuance of a new vacancy announcement for the post, once it was returned to MDS, violated the Applicant's conditions of appointment.

Whereas the Respondent's principal contentions are:

1. The Applicant was not promoted to the D-1 level and does not have an exclusive right to occupy the D-1 post of Deputy Medical Director.

2. The Applicant's rights have not been violated by the decision to open the D-1 post to competition.

3. The Applicant has been offered adequate compensation for the misunderstanding in his case.

The Tribunal, having deliberated from 1 to 22 July 1999 in Geneva, and from 3 to 15 November 1999 in New York, now pronounces the following judgement:

I. The circumstances surrounding the Applicant's appointment were as follows: In October 1995, a vacancy announcement was issued for the D-1 post of "Deputy Director, MEAD". Several candidates submitted their applications, including the Applicant, but the Secretary-General decided to cancel the vacancy announcement and to appoint the Applicant without the advice of the APB, against the D-1 post at the P-5 level. All this is explained in the memorandum of 22 December 1995 from the Assistant Secretary-General, OHRM, to the

APB and reflected in information circular ST/IC/1996/14 of 29 February 1996, as well as in the Applicant's letter of appointment. There is no explanation of why the Secretary-General took this course of action. The fact is that, in the exercise of his powers - as is discussed below - he appointed the Applicant as indicated. The Tribunal cannot but find that the process of appointment to the post of Deputy Medical Director had in fact taken place and that the Secretary-General had determined that the Applicant was the most suitable candidate for the position. For reasons best known to the Administration, but never explained, the Applicant was laterally transferred.

II. According to Article 101 of the Charter, the Secretary-General has the power to appoint staff members of the Secretariat. That power is confirmed by staff regulation 4.1. Undoubtedly, such powers are regulated so that they are exercised with due guarantees to the rights of staff members and particularly to the selection of the best staff members for the efficient administration of the Organization, as expressed in staff regulation 4.2. Under staff rule 104.14 (a) (i), the Secretary-General shall establish an APB "to give advice on the appointment, promotion and review of staff ..." Thus, the APB is an advisory body and its recommendations may or may not be followed by the Secretary-General. In fact, on more than one occasion, he has made a decision setting aside the recommendation of the APB. In the present case, the Secretary-General conveyed to the APB that he had already made up his mind and he did not need its advice. Paragraph 5, section II of General Assembly resolution 51/226 of 3 April 1997 provides that "... the discretionary powers of the Secretary-General of appointment and promotion outside the established procedures *should be* limited to his Executive Office and the under-secretary-general and assistant secretary-general levels, as well as special envoys at all levels." (Emphasis added.) The Tribunal notes, however, that the appointment of the Applicant took place before that resolution was passed and in any event its text does not seem mandatory. It appears, then, that the Applicant was indisputably appointed as Deputy Medical Director.

III. The Tribunal notes that the first communication the Applicant received from the Administration was a letter from the Assistant Secretary-General, OHRM, dated 23 January, 1996, which reads as follows:

> "I am pleased to inform you that the Secretary-General has approved your selection for the post of Deputy Director, Medical and Employee Assistance Division. ..."

There is no mention in this memorandum that the Applicant was being appointed at the P-5 level against the D-1 post, that the D-1 post was to be loaned outside the Division, or that the vacancy announcement had been cancelled.

On 1 June 1996, i.e. four and a half months after this first communication, the Applicant received a new memorandum from the Assistant Secretary-General, OHRM, which stated:

> "1. ...
>
> 2. I apologize if my letter of 23 January 1996 and the notification of your transfer approval have given rise to a misunderstanding by way of the reference to a D-1 post, Deputy Director, of the Medical Services Division. In fact, I am obliged by budgetary constraints to loan the D-1 post in question for use elsewhere. For the time being, therefore, there can be no formal D-1, Deputy Director in the Medical Services Division. This is consistent with your lateral transfer to New York at the P-5 level.
>
> 3. Again, my apologies for any inadvertent misunderstanding and I look forward to seeing you soon."

According to the Applicant, he received this extraordinary memorandum on the date of his farewell party. In any case, it definitively was too late for him to protest or reject it. After receiving the first communication from the Assistant Secretary-General, OHRM, he had already arranged for the shipment of his household effects, sold his cars, taken his children out of school and made all other necessary arrangements for his relocation to New York.

What makes the omission by the Administration even more inexplicable is the fact that there was at least one other communication between the Applicant and the Assistant Secretary-General, OHRM, which did not mention either the lateral transfer or the "misunderstanding" alleged by the Respondent. This is evidenced by the letter from the Applicant to the Assistant Secretary-General, OHRM, of 10 May 1996, as follows:

> "I repeat my thanks for your letter of 23 January 1996, in which you advised me [that] ... the Secretary-General has ... approved my selection for the post of Deputy Director ...
>
> Further, reference to our telephone conversation and agreement with [the Medical Director] and your good self in which you agreed that I report to duty at Headquarters in June, 1996. ..."

Clearly, the June 1996 letter led the Applicant to arrive at certain conclusions: namely, that (a) the D-1 post had been temporarily loaned outside the Division, (b) as soon as the D-1 post was returned, he would be placed against it and eventually promoted to that level, and (c) he would perform the functions of Deputy Medical Director, regardless.

Conclusion (b) is almost inevitable. In the United Nations system, no promotion is possible without a vacant post in the category to which the staff member is promoted. The Tribunal finds that it must have appeared to the Applicant as the only possible reason for not being promoted at that moment and for his consequent and temporary lateral transfer.

The Applicant had been posted in Addis Ababa since 7 September 1992, as Chief Medical Officer, ECA, at the P-5 level. In 1995 he was serving at the P-5, step IX level, near the top of his grade and had ample seniority for promotion to the D-1 level. There was therefore no reason for the Applicant to even suspect that his appointment as Deputy Medical Director was not at the D-1 level, let alone to have thought that he was transferred from Addis Ababa merely to fulfil a temporary need of the Division. Moreover, there was nothing to indicate that this was an emergency situation requiring the immediate filling of the post until the proper appointment or promotion procedures were put in motion and complied with.

Conclusion (c) is supported by elementary reasoning. Even if the D-1 post had been loaned to another duty station, the functions of Deputy Medical Director were not transferred with it; they had remained in the Division and had to be performed by someone. That someone, the Applicant was led to believe, could be no other than himself.

However, none of these justified expectations of the Applicant was fulfilled. The Tribunal is of the view that it was the duty of the Organization to satisfy the Applicant's expectations, as they were raised by the Organization itself. Even though the Applicant signed the letter of appointment whereby he accepted his appointment at the P-5 level, it is obvious that he had no other choice, having already relocated to New York with his family. The Applicant was faced with a *fait accompli* and could only hope that his expectations would be met, bearing in mind that a cardinal principle of the Organization is that it should act in good faith towards its staff members.

IV. The application describes in detail the treatment to which the Applicant was subjected after his arrival in New York. The Applicant was confronted with an "unreceptive hostile attitude" by the Medical Director; he was assigned a small office instead of the office used by the previous Deputy Medical Director; he was not introduced to the appropriate staff; and, the Medical Director instructed the General Service staff not to use the term Deputy Medical Director on his correspondence, but ordained that he be referred to as Senior Medical Officer. Moreover, the relevant page of the 1997 United Nations Telephone Directory lists another staff member as Acting Deputy Director, and the Applicant is merely listed as a Senior Medical Officer. None of those allegations was denied by the Respondent.

The Tribunal finds that the conduct of the Medical Director towards the Applicant was utterly unacceptable. The Tribunal also fails to find an explanation for the conduct of the Assistant Secretary-General, OHRM, who was not only directly responsible for the ominous omissions related to the appointment of the Applicant, but condoned the humiliating treatment of the Applicant by the Medical Director. In addition to that, the Assistant Secretary-General,

OHRM, decided to designate two Deputy Medical Directors within the MSD - one being the Applicant and the other the Acting Deputy Director - thus personally contributing to the general hierarchical disorder reigning in the Division.

V. On 2 December 1996, the Assistant Secretary-General, OHRM issued a memorandum at the end of which he states that "[a]s and when it is viable to return the loaned D-1 post to the Medical Service, an open competitive process for the appointment would be appropriate." In an appeal to the JAB relating to this issue, the Applicant asked for a recommendation to suspend action under staff rule 111.2 (c). The JAB recommended, unanimously, "that the D-1 post of Deputy Medical Director not be the subject of a new vacancy announcement until the subject appeal has been considered and decided upon." But in his memorandum to the Applicant of 29 May 1998, the Under-Secretary-General for Management stated that "the Secretary-General does not agree that irreparable harm will occur if the first stages of the vacancy announcement process are set in motion pending a consideration of [the Applicant's] appeal". In its subsequent report on the merits, the JAB recommended that "no vacancy announcement be issued for the post of Deputy Medical Director, MSD, or if it ha[d] been issued that it be cancelled, and that Appellant be confirmed as Deputy Medical Director at the D-1 level." However, it gave the Secretary-General the alternative to award the Applicant "a symbolic compensation equal to the amount of an SPA from P-5 to D-1 from the date of his arrival at [Headquarters] until the filling of the Deputy Director post at the D-1 level".

In August 1998, when the D-1 post of Deputy Medical Director, MSD, was advertised once again, the Applicant applied for the post, after he had been told that, unless he did so, he would not be considered for it. In the end, the post was given to another Senior Medical Officer who, at the date of the first - and aborted - competition, was not even qualified to be a candidate because of her then P-4 level.

VI. Most of the Respondent's arguments have been addressed in the previous paragraphs. The Tribunal, however, finds that one of them is particularly disingenuous and deserves further consideration. It is first mentioned in the letter of 3 August, 1998 from the Under-Secretary-General for Management to the Applicant, and it is repeated in paragraph 23 of the Respondent's answer. The letter reads, in relevant part:

> "...
>
> The Secretary-General is not in agreement with the position taken by the Panel. The Secretary-General has found that [the letter from the Assistant Secretary-General, OHRM], of 23 January 1996 stating that the Secretary-General had approved your selection for Deputy Director was incomplete. The Secretary-General had decided that you be selected for the post but that you be placed against it at the P-5 level and this should have been stated clearly in [the letter from the Assistant Secretary-General, OHRM]. ...
>
> Clearly the Secretary-General did not recommend that you be promoted to the D-1 level, no promotion exercise took place, and you were not promoted to the D-1 level. ...
>
> ..."

Paragraph 23 of the Respondent's answer reads: "As subsequently transpired, the Applicant erroneously understood the above communication [the January 23 letter] as a notification of his promotion to a D-1 level under the above vacancy announcement. The Respondent admits that the wording of [the Assistant Secretary-General's] letter was incomplete and, under the circumstances, led to a misunderstanding. This misunderstanding was clarified by [the Assistant Secretary-General, OHRM] himself in his memorandum of 1 June 1996 to the Applicant."

It hardly seems necessary for the Tribunal to recall that the Assistant Secretary-General, OHRM, was precisely that, an Assistant Secretary-General with complete authority to transmit the decision of the Secretary-General. There can be no misunderstanding

regarding a text that says, literally, "I am pleased to inform you that the Secretary-General has approved your selection for the post of Deputy Director, Medical and Employee Assistance Division. With my best wishes. Yours sincerely". To imply that a staff member cannot rely on such correspondence from an Assistant Secretary-General is simply preposterous.

If there was a misunderstanding, it was entirely caused by the Respondent. The Respondent alone must bear the consequences of a mistake made by one of his highest officials, not the Applicant, who suffered from that mistake. The omission made by that same official was not remedied by his communication issued four months and fifteen days later, when the Applicant could do nothing but accept the situation. The Tribunal cannot but find that this shows a particular lack of good faith by the Respondent in dealing with the Applicant.

VII. For the reasons stated above, the Tribunal finds, in accordance with article 9 of its Statute, that this case is exceptional. In particular: (a) the glaring omission by the Assistant Secretary-General, OHRM, to fully inform the Applicant of a fundamental condition of his appointment is at best an act of unacceptable negligence and raises the possibility that it was deliberate; (b) the humiliating treatment of the Applicant by the Medical Director continued unchecked for several years; (c) the Respondent failed to take steps to remedy the injustices done to the Applicant; (d) the Respondent's refusal to suspend action pending the outcome of the consideration of the case on the merits by the JAB precluded the possibility of correcting the situation on the part of the Respondent; (e) his hopes for further upward career movement are severely diminished after the most recent filling of the D-1 post in a competition which should not even have taken place: and finally (f) the Applicant has suffered the salary difference between the P-5 and the D-1 levels (allowing credit for the US$15,000 which has been paid to him), which continues even today, and will clearly have implications for his future pension payments. As a result, the Applicant suffered considerable financial losses, as well as immense moral injury.

For this, the Applicant is entitled to compensation which, in the light of the extraordinary circumstances described above, the Tribunal assesses at the amount of three years of the Applicant's net base salary at the rate in effect of the date of this judgement.

VIII. In addition, the Tribunal draws the attention of the Secretary-General to staff rule 112.3, which provides:

> "*Financial responsibility*
>
> Any staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of the staff member's negligence or of his or her having violated any regulation, rule or administrative instruction."

Thus, the Secretary-General may consider that the above rule might be invoked against such officials as he may find deliberately violated the Applicant's rights by undermining his position and humiliating him.

IX. Finally, the Tribunal would like to clarify the following issue. At the 1999 Summer session, it decided to adjourn the case to the Autumn session, in order to hold oral proceedings. In the letter informing the parties of this decision, the Tribunal also urged the Respondent "to consider suspending the promotion process ... in order to preserve the right of all staff concerned, pending its judgement in the case". At the time, the Tribunal was unaware that the selection process for the D-1 post had already been completed.

At the oral hearing, the Respondent presented a copy of a letter from the Under-Secretary-General for Management to the Under-Secretary-General for Legal Affairs, expressing concern about the Tribunal's request "as it indicates the Tribunal's intention to assume a role that is the clear and exclusive prerogative of the Secretary-General" and emphasizing "the unacceptability of the Tribunal deciding on actual promotions".

The intentions and expectations of the Tribunal were evidently misunderstood. The Tribunal is and was at all times fully aware of the limitations on its jurisdiction. The letter was prompted by its belief that the Secretary-General would be interested in knowing the Tribunal's findings as to the merits of the case and, accordingly, delay action rather than alter the status quo, making an order of specific performance impossible. Now that the post has been filled, the Tribunal is confronted with a *fait accompli*, making it futile and improper to issue such an order.

X. In conclusion, the Tribunal:

(a) Orders that the Respondent pay to the Applicant compensation of three years net base salary at the rate in effect of the date of this judgement;

(b) Recommends that the Respondent make every effort to find a D-1 post for the Applicant, commensurate with his qualifications and experience;

(c) Rejects all other pleas.

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Vice-President

Kevin HAUGH
Member

New York, 15 November 1999

Maritza STRUYVENBERG
Executive Secretary